FOR ARGUMENT

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1397

JOSEPH JUDICE, individually and in his capacity as a Judge of the Dutchess County Court, RAYMOND E. ALDRICH, JR., individually and in his capacity as a Judge of the Dutchess County Court,

Appellants,

against

HARRY VAIL, JR., et al.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

REPLY BRIEF FOR APPELLANTS AND SUPPLEMENTAL APPENDIX

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Statement

This reply brief is submitted in response to the Brief for Appellees and Brief of Amicus Curiae, New York State Consumer Protection Board.

1. The questions of abstention and *res judicata* are threshold issues to be determined before the constitutional issues allegedly raised by the complaint may be reached.

The court below in its opinion (J.S. 4a-7a) and the Brief for Appellants (pp. 11-16) discussed abstention before

reaching the constitutional issues. We also discussed *res judicata* (Br. for App'ts., pp. 16-17) in that context.* However, the appellees have discussed the constitutional questions as if they were the basic issues, thereby relegating abstention to a subsidiary position.

The appellants fail to offer any persuasive basis for distinguishing this case from *Huffman* v. *Pursue, Ltd.*, 420 U.S. 592 (1975). As we pointed out in our main brief the district court labelled the state court procedure as quasi-criminal and accordingly it does not require any new pronouncement for this Court to conclude that the *Huffman* rule was controlling here. The same criticisms of that approach rejected in *Huffman* are repeated by appellants here and are without force. If perchance the *Huffman* rule is regarded as requiring extension here because the state court proceedings are quasi-criminal, rather than criminal, then we submit the same considerations of comity are applicable here. The unseemly character of making the named Judges of the State's County Court parties to this litigation in the Federal courts simply because one or the other signed an order regularly presented upon the unquestioned default of the judgment debtor because of far-out claims of alleged constitutional import never presented to either one of the Judges or to any other State Judge must be readily apparent. There is no reason that the Federal courts should provide a vehicle for such far-out claims when the State court proceedings

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* Appellees' contention (Br., p. 60[IV, A]) that appellants failed to raise *res judicata* in the Jurisdictional Statement is erroneous. In our Jurisdictional Statement (p. 18) we stated that the judgment herein was "in defiance of *res judicata* . . ." In accordance with Supreme Court Rule 15(1)(c), the question or issue was "set forth in the jurisdictional statement or fairly comprised therein. . . ." Furthermore, *res judicata* was listed as a ground for dismissal of the complaint by appellants in their Notice of Motion to Dismiss (164a).

pending before such Federal action offer an opportunity, if desired, to test out such theories, which, as the *amicus* indicates, is an effort to abort the State's system of proceedings supplementary to the State court's judgment in its enforcement.

Appellees fail, too, to deal with the significance of the fact, pointed out in our main brief that in the New York City courts, at least—the equivalent of the County Court—the order to show cause contains the additional cautionary language which the district court felt erroneously was a constitutional requirement (Main br. p. 25, fn.) So that the three-judge court was dealing with an alleged criticism having local application insofar as supplementary proceedings were concerned and with a state statute which by its terms did not rule out such additional language.

A. Adequacy of State Remedy.

Appellees' conclusion (Brief, p. 48) that state court remedies are inadequate is erroneous. A reading of *Matter of Smiley*, 36 N Y 2d 433, 330 N.E. 2d 53, 369 N.Y.S. 2d 87 (1975), fails to support the proposition that appellees will be deprived of counsel in civil contempt proceedings if such assistance is necessary or warranted. *Smiley* concerns an action for divorce. As there stated (36 N Y 2d, at 441), "[t]he courts have a broad discretionary power to assign counsel without compensation in a proper case (CPLR 1102, subd. [a]. . . ." Also alluded to are the voluntary organizations and federally-funded programs providing legal assistance.

It should also be pointed out that there is no showing that CPLR 5015 (App'ts Br., p. 22)—a motion to vacate the default and subsequent order—is not a "plain, adequate and complete remedy at law." See *Gras* v. *Stevens*, 415 F. Supp. 1148, 1154 (S.D.N.Y., 1976) and citation (at 1153) of *Matthews* v. *Rodgers*, 284 U.S. 521, 526 (1932). Under *Huffman* v. *Pursue, Ltd.*, 420 U.S. 592, 605 (1975),

if appellees' attacks on the constitutionality of the statutes fail in the New York courts, an appeal to this Court would lie as a matter of right, 28 U.S.C. § 1257(2). A possible shifting of the burden of proof is irrelevant.* A litigant attacking the constitutionality of the statutes in question always bears the burden of proof of persuasion regardless of the time of making the motion or claim. *Van Berkel* v. *Power*, 16 N Y 2d 37, 40, 209 N.E. 2d 539, 261 N.Y.S. 2d 876 (1965). Obviously the appellants or judgment creditors never had any burden of proving the Judiciary Law to be constitutional.

Gras v. *Stevens, supra* (415 F. Supp. at 1154), indicates that a state court litigant cannot simply enter federal court to challenge state law or court procedures. *Gras* involved a divorce proceeding which obviously had no "criminal" overtones.**

B. Deference to State Courts, Not Private Litigants, is Involved.

Appellees (Br., p. 49) rely on *Joiner* v. *City of Dallas*, 380 F. Supp. 754 (N.D. Tex., 1974), affd. 420 U.S. 1042 (1974), as their lead case that federal comity does not require deference "to procedurally unconstitutional state civil contempt, statutes." Of course appellees beg the question—they assume the statutes are unconstitutional. However, *Joiner* was a challenge to the power of eminent domain in Texas. The court did decline to abstain but this was before this Court's decision in *Huffman*, cf. *Ahrensfeld* v. *Stephens*, 528 F. 2d 193 (7 Cir., 1975). The holding, however, upheld the constitutionality of the statutes. The latter was what this Court affirmed, 420

* Cf. Appellees' Br. p. 42.

** *Doe* v. *Maher*, 422 U.S. 391 (1975), on remand, 414 F. Supp. 1368 (D. Conn. 1976), declined to abstain (cf. App's Br. p. 52, n. 74). The overriding issue was the federal Social Security Act, *supra* at 1382, not civil contempt procedures.

U.S.C. 1042.* (Citation by the appelles of the affirmance, without explanation, has a misleading effect.)

The power of a court to punish violations of court orders is so basic, that any injunction against that power must have a devastating affect on state court processes. The process here is controlled by the state court. Contrary to appellees, Br., p. 52, n. 52, 77, the civil contempt proceeding is *not* commenced by service of a summons.**

Plainly, as *Huffman* recognizes, invocation of absention herein is not an unwarranted limitation on the federal court's power. *Mitchum* v. *Foster*, 407 U.S. 225, 243-244 (BURGER, C.J. conc.) (1972), recognized that a Federal court must always consider principles of federalism, equity and comity. *Huffman* v. *Pursue, Ltd., supra*, surely extended this recognition to such civil matters as involved here. In essence, the Federal court here exercised appellate jurisdiction over the state court. This is not one of its powers. *Rooker* v. *Fidelity Trust Co.*, 263 U.S. 413 (1923).

To contend that the Judiciary Law is "flagrantly and patently violative of express constitutional prohibition"

* The *Joiner* opinion, *supra*, 380 F. Supp. at 778-779, recites the whole statutory scheme. While it is upheld, the court notes the basic problems that may flow from "outmoded statutes." The statute may "fall far short of perfection." It noted due process (and equal protection) are not static concepts, but neither "are they protean labels capable of encompassing every desirable innovation and improvement" (779). The Constitution does not purport to correct every wrong. *Lindsey* v. *Normet*, 405 U.S. 56, 74 (1972).

Much the same could be said of the New York Judiciary Law and civil contempt. Yet the Constitution is the bedrock of our legal system, not the summit.

** The appellees even contradict this statement themselves. Br., p. 23, n. 27(4) citing *Byrne* v. *Long Island State Park Commission*, 67 Misc 2d 1084, 1085, 325 N.Y.S. 2d 147 (S. Ct., Nassau Co., 1971). Judiciary Law § 757 requires an order to show cause or a warrant of attachment, or perhaps both if appropriate. See Main Br., p. 23.

(Appellees' Brief, p. 54) is absurd. Basic due process is notice and an opportunity to be heard. The statute here provides this (J.S. 7a). The inordinately lengthy briefs of appellees and *amicus* amply demonstrate their difficulty in attempting to make such a point.

Appellees also purport to show that orders in contempt matters are not judgments and not subject to principles of *res judicata* (Appellees' Brief, pp. 60-61). This particular argument is berift of any support. The cases cited do not stand for the proposition advanced. Judgments in New York are defined by CPLR 5011. Whether an action or "special proceeding", the final paper in either is a "judgment." See Practice Commentary (D.D. Siegel) to § 5011, 7B McKinney's CPLR 3401 to 5100; p. 548. Federal law, 28 U.S.C. § 1738, gives full faith and credit to "records *and* judicial procedings" of any state court. Obviously the technical label of an order in a civil contempt proceeding should not affect its sufficiency.

2. The grant of summary judgment was error.

The appellees (V, Br., p. 62 *et seq.*) continues to ignore the fact they were not moving for summary judgment, partial or complete and that the district court itself took the action under Rule 8. Appellants were not disputing any of the allegations in the affidavits as they were moving to dismiss. Appellees picture the fact of "indingency" as without significance. Yet the district court found Vail, the "typical" plaintiff, indigent (J.S. 2a-3a). No defendant, certainly appellants, knew of Vail's indigency in the state court. To remedy this, appellees claim indigency "was also a matter of public record as Vail, Ward, Humes, and Howard were recipients of various public assistance grants" (pp. 63-64) and it was not proper to deny such knowledge. Such a statement, and it is concurred in at two places by the *Amicus* (Br., pp. 53 and 69, n. 15), is directly contrary to New York law. Receipt of public assistance is not a matter of "public record" in New

York. By virtue of Social Services Law § 136 names and address of persons receiving or even applying for such assistance are confidential and available only in limited circumstances. Defendants or appellants could not know appellees were on public assistance unless appellees so informed them.

We have already noted in our "Statement of the Case", Main Br., pp. 5-6, that if appellees had pointed out to the state court their indigency they would be released from civil imprisonment, or end the examination in supplementary proceedings. This has ample support in New York law. In *Matter of Oysterman's Bank and Trust Co.* v. *Colby*, 62 Misc 2d 64, 308 N.Y.S. 2d 284 (Sup. Ct., Suffolk Co., 1968), the court denied a motion to punish for contempt for failure to be examined. This was simply on the basis of a letter from the judgment debtor's daughter and the County Department of Social Services indicating that the debtor was on public assistance. Note this result did not depend on counsel's assistance. Further the court enjoined any further proceeding to enforce the judgment. This was pursuant to Social Services Laws §§ 137. 137-a.

There is of course no bar to the appearance of counsel at the return of the order to show cause or at any other time, but the only purpose of counsel is either to challenge the service of the subpoena or to offer an excuse acceptable to the court for the non-appearance of the judgment debtor [or the failure to make the support payment]. Since the court below speedily converted the motion to dismiss into summary judgment, it did not have before it statistical proof that in almost every case where a judgment debtor appeared on the return of the order to show cause, offered an excuse for failure to respond to the subpoena and readiness to submit to the discovery, the court did not impose any fine. It is fanciful to preach the necessity of counsel to be supplied to indigent judgment debtors, since by appearance and submitting to discovery at the return of the order to show cause, not only would there be no fine but

there would be finding of no assets available for the judgment. See *Oysterman's Bank, supra.*

This points up the unsupportable character of the district court's granting of summary judgment. Indeed its action shows that it ignored the established principle that "summary judgment is not to be granted unless the movant has established his right to a judgment with such clarity as to leave no room for controversy". *Robert Johnson Grain Co.* v. *Chem. Interchange Co.*, 541 F. 2d 207, 209 (8th Cir. 1976). The court also failed to "view the facts in the light most favorable to the party opposing the motion and to give that party [the appellants here] the benefit of reasonable inferences to be drawn from [the] underlying facts." *Ibid.* at 210, citing *Adickes* v. *S. H. Kress & Co.*, 398 U.S. 144, 153-59; *United States* v. *Diebold, Inc.*, 369 U.S. 654; *Perciuzi* v. *General Motors Corp.*, 539 F. 2d 1126 (8th Cir. 1976).

3. The statutes involved did not deny appellees' due process.

At several places in appellees' brief there is emphasis on assumed lack of finding of wilfulness. This is mistaken as is evident from the orders of the County Court. Thus ". . . Harry Vail, Jr., is adjudged guilty of contempt of court in having wilfully disobeyed said subpoena . . ." in that he failed to comply therewith and failed to satisfactorily excuse or explain said contempt (Appellees' App. 7a). See same language in commitment order (A. App. 9a). Every such order must contain such finding.

Furthermore, contrary to the view of appellee, such order also contain the finding that "said misconduct was calculated to and actually did defeat, impair, impede and prejudice the rights and remedies of the judgment creditor."

Continued reiteration of the rubric of the right to a hearing to explain Vail's (or any other appellee's) absence on the subpoena return date has no vitality here. The commitment order follows the opportunity extended to explain the failure to respond to the subpoena by the procedure for the service of the order to show cause as to why such person should not be adjudged in contempt. Thus every such person is afforded a full opportunity to explain failure to respond to the subpoena and it is simply an effort to remake the judgment creditor discovery proceedings or the matrimonial support proceedings to insist that the order to show cause is constitutionally inadequate because it fails to spell out the possible disposition of the contempt proceedings. There is absolutely no support for any statement that the failure to respond to the contempt order to show cause was because such disposition is not spelled out in the order to show cause. It is not the function of the Federal courts to substitute their judgment as to what may be constitutional by their judgment as to what may be desirable. *Lindsay* v. *Nornet, supra*, 405 U.S. 56.

Due process is fully satisfied by the opportunity extended to the contemnor to explain the failure to respond to the subpoena or in matrimonial matters to comply with the support order before any commitment order is made and if the contemnors ignore such order to show cause there is no constitutional requirement of due process which would insist that another opportunity must be tendered for the same purpose. The principles enunciated in the cases cited by appellee are fully complied with in the statutory procedure.

It is to be noted in this connection that the order finding the judgment debtors in contempt provides for installment payments of the fine over a period of five months and that such persons, if they shall have any explanation, have an additional opportunity to appear in court and seek recall of the order entered upon their default. (See App. App. 7a). Vail simply ignored the "order imposing

fine" made on August 30, 1974. The commitment order (App. 8a-9a) was made about a month later on September 23rd, demonstrating the more than adequate opportunity to seek recall of the contempt order and to offer any explanation, a variety of which are conjured up by appellees.

In this connection the extended references to defective service ("sewer service") either in the brief of appellees or in the amicus brief has no relevance to the legal issues presented to this Court. In the record here no appellee has challenged the validity of the service of the discovery subpoena, the order to show cause, or of the order imposing the fine.

Insofar as such briefs evidence any attitude antagonistic to the proceedings supplementary by judgment, it overlooks the fact that the State has an interest in facilitating the enforcement of judgments obtained in its courts.

4. Class Action treatment.

The appellees in supporting class action status allege commonality of the issues. As the seven sections of the Judiciary Law were enjoined the issues must be common to all who are subjected to civil contempt. Truly this is not the case here. The appellant in *Agur* v. *Wilson*, 498 F. 2d 961 (2d Cir., 1974), *cert. den.* 419 U.S. 1072 (1974) is as much a member of the class as Mr. Vail. Despite the decision in *Agur*, the statute are enjoined as to all persons allegedly in contempt. The injunctive relief flows to the class without limitation.

5. The availability of relief at any stage does not require an actual hearing before a commitment order issue.

Appellees have attacked our reliance on *Endicott-Johnson Corp.* v. *Encyclopedia Press, Inc.*, 266 U.S. 285 (1925) (Br. p. 44). Actually the instant case involves fines imposed for contempt or property of persons which is protected by due process as much as "liberty." However *Endicott-Johnson* is still valid law and was not eviscerated by *Griffin* v. *Griffin*, 327 U.S. 220 (1946) and the line of cases following *Sniadach* v. *Family Finance Corp.*, 395 U.S. 337 (1969). This is the holding of *Brown* v. *Liberty Loan Corp. of Duval*, —— F. 2d —— (5th Cir., 1976, Slip Opinion, p. 6088) 45 L W 2214 (Nov. 2, 1976).* Due process does not require notice and an opportunity to be heard before wages are garnished as a post-judgment remedy. The state has an interest in facilitating the enforcement of judgments which outweighs the debtor's interest in possible statutory exemptions. Thus no special notices are required. Actual notice also is not a prerequisite. *Brown*, p. 6103. There is no due process requirement of prior notice of a writ of garnishment. Or, we might add, multiple opportunities to be heard on a contempt proceeding.

6. The affidavit of James Hurry fails to show illiteracy.

While not relevant to the disposition of the appeal, the appellants' brief alleges; p. 25, n. 30, "Hurry is illiterate." We annex Mr. Hurry's affidavit herein as a supplemental appendix in this appeal. It fails to allege illiteracy. Furthermore Hurry obviously has a driver's license as he has a car worth $1700 in repairs** which he "took" to the auto repair shop. Aff. ¶ "3". A requirement for issuance of a driver's license in New York is an "ability to read", N.Y. Vehicle and Traffic Law § 502(4).

We verified Mr. Hurry's driver's license with the Department of Motor Vehicles. This fact is "public record" while receipt of public assistance is not. Social Services Law § 136, *supra*.

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* Appellees relied at p. 56, ftn. 67 on the reversed lower court decision (392 F. Supp. 1023).

** Query—is this appellee "indigent" if he has such a valuable item of property?

CONCLUSION

The order below should be reversed.

Dated: New York, New York
November 19, 1976

Respectfully submitted,

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SUPPLEMENTAL APPENDIX

Affidavit of James Hurry.

[SAME TITLE]

JAMES HURRY, being duly sworn, deposes and says as follows:

1. Plaintiff Hurry is a citizen of the United States and the State of New York. He resides at 126 Thompson Street, Poughkeepsie, New York, with his wife and infant child.

2. Plaintiff Hurry is 40 years of age.

3. In August, 1973, Plaintiff Hurry was involved in an automobile accident. Plaintiff Hurry took his automobile to Defendant H. H. Redl's Auto Body Works to be repaired. After the automobile was allegedly repaired, the Plaintiff's insurance company paid Defendant Redl's Auto Body Works about $1600.00. Because Plaintiff Hurry had $100 deductible insurance, he owed Defendant Redl $100.

4. On or about September, 1973, Plaintiff Hurry went to Defendant Redl's to get his car that was allegedly repaired. After he paid $50.00 to Defendant Redl's, he drove the car and found that it had not been completely repaired. When he asked Defendant Redl to complete the repairs, they did not do so and Plaintiff Hurry refused to pay the final $50.

5. On June 28, 1974, a default judgment was entered in the City Court of the City of Poughkeepsie, New York, in the case *Herbert H. Redl, d/b/a H. H. Redl's Auto Body Works* v. *James D. Hurry* in favor of Herbert H. Redl and against Plaintiff Hurry for $90.43.

6. On August 8, 1974, Thomas A. Reed, Attorney for Defendant Redl served by mail a subpoena duces tecum, requiring Plaintiff Hurry to appear on August 20, 1974, before a notary public at 75 Market Street, Poughkeepsie, New Work, for the taking of a deposition regarding all matters relevant to the satisfaction of the judgment of June 28, 1974, and to produce certain records.

7. When Plaintiff Hurry failed to appear on August 20, 1974, Defendant Juidice issued an Order to Show Cause pursuant to Judiciary Law Article 19, Section 757(1) ordering Plaintiff Hurry to appear at the Dutchess County Court on September 10, 1974, at 10:00 a.m. to "show cause why he should not be punished as for contempt for violation of and non-compliance with the said subpoena in that he failed to appear or respond pursuant thereto . . ."

8. When Plaintiff Hurry failed to appear on September 10, 1974, the hearing on the Order to Show Cause was adjourned to September 24, 1974, at 10:00 a.m.

9. When Plaintiff Hurry failed to appear in County Court on September 24, 1974, Defendant Juidice issued an Order of Contempt on October 2, 1974, pursuant to Judiciary Law Article 19, Section 770 holding Plaintiff Hurry in contempt and ordering:

> ORDERED that the said defendant James D. Hurry for his misconduct and willful contempt be and he is hereby fined the sum of $104.43 to be paid to the Plaintiff(s), besides the sum of $10.00 costs of this proceeding by paying said amount to Reed & Reed, Esqs., attorneys for the Plaintiff(s), by making installment payments in the amount of Twenty ($20.00) dollars per week, commencing one week after service of a certified copy of this order. Upon payment as

> aforesaid, the said defendant shall be deemed purged of his contempt, but in the event of his failure to pay as directed, said defendant be committed by the Sheriff of the County wherein he may be found in the County Jail of such County to remain retained there until he has paid the fine imposed as aforesaid, together with the costs and the sheriff's legal fees in connection therewith and that a warrant of commitment be issued accordingly without further notice.

10. Defendant Juidice issued the Order of Contempt based upon the following:

> Upon reading and filing the Order to Show Cause dated the 22nd day of August, 1974, with due proof of service thereof on the defendant, James D. Hurry, the affirmation of Thomas A. Reed dated the 20th day of August, 1974, and upon all the pleadings and proceedings heretofore had herein, and after hearing Reed & Reed, Esqs., Thomas A. Reed, of counsel, for the plaintiff(s) in support of said motion, and there being no opposition there to . . .

11. A copy of this Order of Contempt was served on Plaintiff Hurry's wife in November, 1974.

12. When Plaintiff Hurry failed to comply with the Order of Contempt, Defendant Juidice issued an *ex parte* Commitment Order pursuant to Judiciary Law Article 19, Section 756.

13. On or about December 19, 1974, a sheriff from Defendant Quinlan's office went to Plaintiff Hurry's home to serve the Commitment Order on Plaintiff Hurry. Because Plaintiff Hurry was not at home at the time, the sheriff notified Plaintiff Hurry's wife that he had a Commitment Order to arrest Plaintiff Hurry and that he would

return to execute the Commitment Order on or about January 2, 1975. No prior applications for similar relief have been made.

14. At the present time Plaintiff Hurry refuses to pay the fine because he maintains that Defendant Redl never properly repaired his car.

15. Plaintiff Hurry is currently unemployed. He supports himself, his wife and infant child on loans from family. Plaintiff Hurry hopes to begin receiving Unemployment Insurance Benefits in two weeks.

16. Plaintiff Hurry has over $6,000 in debts.

17. Plaintiff Hurry's assets include clothing, furniture, and an automobile, which he uses to look for work.

18. As the Order of Contempt was served upon Plaintiff Hurry's wife November, 1974, Plaintiff is in imminent danger of being imprisoned pursuant to the Order of Contempt.

• • • • • •

20. Plaintiff Hurry contends that the imposition of the fine and the punishment of imprisonment in the event the fine is unpaid is violative of his rights secured by the Fifth, Eighth and Fourteenth Amendments to the United States Constitution.

21. With respect to the fine of $104.43 plus $10.00 costs, Plaintiff Hurry contends that Defendant Juidice wrongfully imposed the fine without affording him the procedural right to answer Defendant Redl's charge of contempt or to challenge the amount of the fine imposed in violation of his right to due process secured by the Fifth and Fourteenth Amendments.

22. Plaintiff Hurry has not been apprised of his right to counsel in this proceeding nor is there any provision pursuant to Article 19 of the Judiciary Law for the appointment of counsel for indigent persons faced with the imminent danger of imprisonment in violation of the right to counsel secured by the Fifth and Fourteenth Amendments.

23. Plaintiff Hurry contends that the imprisonment that may occur due to non-payment of the fine is in violation of the Eighth Amendment's ban upon cruel and unusual punishment in that the term of imprisonment is indefinite and disproportionate to the offense alleged.

s/ JAMES D. HURRY
JAMES D. HURRY